Journal of the Institute for the Study of Legal Ethics

Volume 2 Article 6

1-1-1999

Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems

Mary C. Daly

SOME THOUGHTS ON THE DIFFERENCES IN CRIMINAL TRIALS IN THE CIVIL AND COMMON LAW LEGAL SYSTEMS

*Mary C. Daly**

Like the prologue in a Shakespearean play, I am here to set the stage for the conflict to follow. My limited role is to introduce you by way of background to pretrial and trial proceedings in the common and civil law legal systems so that Professors Freedman and Weinreb may verbally spar over the merits of the so-called adversarial and inquisitorial methods of truth-finding.[1] Before turning to this task, however, I must sound a warning or two. First, pressed by the twin necessities of brevity and clarity, my descriptions will be stark. I have abolished nuances from my discourse and deliberately elected to script my remarks with a sweeping cadence. I will not depart from the traditional canons of comparative law scholarship, although the field is currently enjoying a renaissance. Second, my description will suggest two fixed and isolated systems, devoid of internal evolution and without interaction. Both suggestions are misleading. Responding to the globalization of capital and industrial markets and the incipient globalization of the legal profession, the two legal systems are separately undergoing a remarkable transformation in which the influence of each on the other is substantial.[2]

---

* James H. Quinn Professor and Director, Stein Institute of Law and Ethics, Fordham University School of Law.

1. These remarks were prepared in anticipation of a debate on the different methodologies used in the civil and common law systems to determine the guilt or innocence of a defendant in a criminal trial. Unfortunately, Professor Freedman was unable to participate in the debate. He and Professor Weinreb are among the most thoughtful scholars who have wrestled with the complex comparative law and professional responsibility issues that such a debate inevitably raises. *Compare*, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) *with* LLOYD L. WEINREB, DENIAL OF JUSTICE (1977). For an extended bibliography, see Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, And Why Should We Care?*, 78 CAL. L. REV. 539, 543 notes 2-3 (1990); Edward A. Tomlinson, *The Saga of Wiretapping in France: What It Tells Us About the Criminal Justice System*, 53 LA. L. REV. 1091, 1141 notes 221-22 (1993).

2. I have explored these themes elsewhere in greater depth. Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057 (1997); *see also* Mary C. Daly, *What Every Lawyer Needs to Know about the Civil Law System*, 1998 THE PROFESSIONAL LAWYER 35. Mary C. Daly, *Thinking*

To facilitate my description, I would like to tap into our shared legal subconscious and bring three high-profile events to the fore: the California trial of O.J. Simpson, the Massachusetts trial of Louise Woodward, and the French investigation into the death of Princess Diana. These events, I submit, are handy tools for exploring the way the two systems search for justice in criminal proceedings. Of course, they are not perfectly suited for this task. The civil law system is neither uniform in its procedures nor homogeneous in substantive law content. Consider, if you will, that the geographic mass of "the civil law system" stretches over Spain, Portugal, Germany, Italy, Belgium, and the countries of Latin America as well The Netherlands and the Scandinavian countries.[3] Moreover, the three events are, or have been, the subject of intense media scrutiny and two of the participants, O.J. Simpson and Princess Diana, were public celebrities in their own right before the legal proceedings began. I am quite sure that the conduct of the proceedings is not truly representative of the ordinary, day-in, day-out operations of either the French or U.S. courts. Nonetheless, I am hopeful that an examination of the two trials and the investigation will illustrate the enormous differences in structure and culture that separate the common and civil law systems.

First, let us briefly look at the structural differences. Since most of us in this room have a passing familiarity with the O.J.[4] and Woodward cases[5], I will not dwell on them extensively. In each of these cases, the prosecutor's office supervised investigatory teams of police officers and forensic scientists in the conduct of an investigation into the subject crime. Each prosecutor subsequently convened a grand jury whose task it was to hear testimony, assess the physical evidence and determine whether there existed sufficient evidence to believe that the target of the investigation had committed a crime. Each grand jury voted an indictment. Thereupon, the prosecutor's office represented by the very same lawyers, tried the case to verdict before a jury of lay persons. The role of

---

Globally: Will National Borders Matter to Lawyers a Century from Now?, 1 J. INST. STUDY LEG. ETHICS 297 (1996); Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, 1995 THE PROFESSIONAL LAWYER 123.

3. *E.g.*, 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard A. Abel & Philip S.C. Lewis eds., 1988).

4. *Compare* JOHNNIE L. COCHRAN, JR., JOURNEY TO JUSTICE (1996) *with* CHRISTOPHER DARDEN, IN CONTEMPT (1996); *see also* Mark Miller & Donna Foote, *How the Jury Saw It*, NEWSWEEK, Oct. 16, 1995, at 36.

5. *E.g.*, Deborah Eappen & Terry McCarthy, *One Mother's Story "How Did Louise Become the Hero and I Become the Villain?,"* TIME MAGAZINE, Nov. 24, 1997, at 57; Debra Rosenberg, *The Nanny Spin Wars: The Players in an International Drama Take Their Case to the Airways in a Trial that Just Won't End*, NEWSWEEK, Nov. 17, 1997, at 74.

Judges Ito and Zoebel, compared to that of the prosecutor and defense counsel, was limited. In theory, these judges acted as umpires, responding to lawyer-initiatives, deciding the motions and arguments made by the defense counsel and the prosecutor. Of course, scholars and practitioners alike acknowledge that the umpireal metaphor is mightily flawed. Nonetheless, appellate court decisions and legal culture expressly limited the two judges' freedom. Judges Ito and Zoebel neither called witnesses on the court's behalf nor questioned the witnesses called by the lawyers to any significant degree.

The lay jurors remained silent throughout the two trials. And when called upon to render their verdict, they were instructed carefully by the judges as to how they should review the evidence. Their freedom to ask questions and review the evidence as they saw fit was nonexistent.

In France, the pretrial proceedings and the trial itself bear little resemblance to their U.S. counterparts. From the accused's perspective, the most critical part of French criminal procedure is the pretrial investigation. The "real combat," so to speak, takes place during the investigation. The trial is anticlimactic. There is no grand jury in France. In its place is the investigating magistrate. Over two hundred years ago, Napoleon observed that the most powerful person in France is the investigating magistrate.[6] Illustrative of his power is the *garde à vue*, a detention period of up to 48 hours in which a suspect may be imprisoned upon the request of the investigating magistrate. Until very recently, the suspect had no right to secure legal advice during this period; now he or she has limited access.[7] At the present time, two investigating magistrates working as a team are exploring the events surrounding the death of Princess Diana. Their job is to collect the facts, to determine whether formal charges should be filed, and to decide which individuals should be charged. Above all, they are to conduct the investigation "in the interests of the manifestation of the truth."[8] Their investigation, moreover, will not be confined solely to the facts of the accident. The French Penal Code directs them to conduct an extended inquiry into the suspects' *personnalité*, a term that is almost impossible to translate. It includes the suspects' "behavior, morals, associates, family background and means of existence."[9] Thus, the investigating magistrate will question the spouse, adult children, friends, co-workers, and neighbors of each suspect specif-

6. Craig R. Whitney, *Ins and Outs of French Law: Hotel Could Be Charged in Diana's Death*, N.Y. TIMES, Sept. 15, 1997, at A10.

7. Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 532 (1997).

8. *Id.* at 535. *See generally* Tomlinson, *supra* note 1, at 1103-15.

9. McKillop, *supra* note 7, at 532, note 19.

ically to learn about his or her character, not to unearth evidence relevant to the accident. The spirit of this inquiry is reflected in the French maxim, *on juge l'homme, pas les faits*, that is, one judges the man, not the facts.[10]

All the findings from this investigation are recorded in detail and kept in a file, the *dossier*. This paper trail is available to the suspect and to any civil parties associated with the investigation but is not available to anyone else, including the media. The magistrates conduct their investigations in private pursuant to the law of *secret d'instruction*. The law bars the magistrates, court officials, and police from issuing any statements until the case formally comes to trial. Consequently, there are no press releases or conferences.[11] Leaks in even the most notorious cases are a rare exception. The law springs from the conviction that justice and truth are more likely to be achieved if the investigating magistrates are insulated from public pressure. The absence of public outcry and speculation may account for the fact that the average length of a criminal investigation is sixteen months.[12] If an investigating magistrate concludes that charges are warranted, he turns the matter over to the prosecutor's office.

The investigating magistrate, moreover, bears a particular burden unfamiliar to this side of the Atlantic. In the United States, it is generally said that a prosecutor does not act unethically by filing criminal charges against a defendant even if he personally would not vote for conviction as a jury member. It would only be unethical if the prosecutor believed that a jury would be acting unreasonably in returning such a verdict. In contrast, in France the investigating magistrate must be *personally* convinced of the accused's guilt. He must find "weighty and corroborative proofs" against the accused.

Investigating magistrates pride themselves on their reputation for independence from the State in general and from the prosecutor's office in particular. The prosecutor's office, moreover, is under the supervision of the Ministry of Justice, not the judiciary; this structural separation further contributes to the independence of both offices. Of course, no system is immune from political pressure. In France, such pressure is generally brought to bear on the prosecutor's office after the investigation is completed. Many commentators believe, for example, that it was precisely this sort of pressure that delayed the trial of Maurice Papon for

10. *Id.* at 579.

11. Julie Read et al., *Silence of the Law Leaves Room for Doubt and Rumour*, THE EUROPEAN, Sept. 18, 1997, at 20.

12. *Diana Probe Could Last into Next Year*, Agence France Presse, Sept. 11, 1997.

over sixteen years.[13] Mr. Papon, as I am sure most of you in the audience know, was an ex-Vichy aide who was convicted this past week of complicity in Nazi crimes against humanity by a court in Bordeaux.

What would a criminal trial look like if the investigating magistrates conclude that a crime has been committed in connection with the death of Princess Diana? What might the charges be? Possible criminal charges include invasion of privacy, failure to assist a person in danger, involuntary manslaughter, and recklessness or gross negligence. The first two possibilities are distinctly the product of the French civil law. While France's privacy laws prohibit taking of photographs against the subject's will in private places, they are allowed in public places. The investigating magistrate, therefore, must first conclude that a car is a private place before charges can be brought against the paparazzi who took photographs of the Princess and Mr. Al-Fayed in the crashed limousine. As for the second charge, failure to assist a person in danger, French substantive law, unlike the laws of the fifty states, places an obligation on the observers to an accident to help those in danger unless they themselves would be at risk.[14]

Certainly, it is easy to imagine the drama of a U.S. courtroom if similar charges were brought on this side of the Atlantic. A deluge of motion papers, all filed in court as public records with access by the media, would argue for and against the proposition that a car was a private place. A parade of expert witnesses would reconstruct the accident scene either to show that the defendant photographers could have easily come to the assistance of Princess Diana and Mr. Al-Fayed or to show precisely the opposite — that any attempt to rescue would have exposed them to personal peril. These experts, moreover, would be selected by the defense and prosecution, and each side would vigorously attack the credibility and competence of the other's expert witnesses. The untutored lay jury would have to try to make sense of the experts' inconsistencies and contradictions. The rules of evidence would be used as weapons to keep as much of the opposing side's testimony and physical evidence from ever reaching the jury.

Now let's see what can be expected if criminal charges are actually filed in France. The O.J. trial lasted 372 days from the beginning of jury selection to the verdict. In contrast, even the most complex French trials

13. Craig R. Whitney, *Ex-Vichy Aide Is Convicted And Reaction Ranges Wide*, N.Y. TIMES, Apr. 3, 1998, at A1; telephone conversation with Professor Joel Reidenberg, Apr. 3, 1998.

14. Thomas Kamm & Paul M. Barrett, *How Would Paparazzi Who Stalked Diana Fare in French Court?*, WALL ST. J., Sept. 2, 1997, at A1.

rarely exceed two weeks.[15] The Papon trial was an exception, lasting six months.[16] The average length of a criminal trial is two-to-three days of public testimony. Rather than being a charged arena in which lawyer-combatants argue their clients' case, the French courtroom is low-key to the point of being bland. The questioning is conducted almost exclusively by the judges, about whom I will speak more in a moment. Drama, excitement, even curiosity are conspicuously absent from high-profile cases as well as routine ones. Professor George Bermann, a renowned international law scholar at Columbia University School of Law, has invoked the multidimensional metaphor of a "bureaucratic climate" to describe the atmophere of the proceedings in a French courtroom.[17]

Undoubtedly contributing to this atmosphere are the rules of procedure and the content of the substantive law. On the procedural side, most of the arguments made by both the prosecution and defense counsel are in writing. The judges almost exclusively conduct the examination of witnesses, although the lawyers are free to suggest additional questions for the judges' consideration; and on occasion, they may even question a witness directly. In the civil law system, the judges — not the parties — drive the criminal process.[18] Thus, to speak of the prosecutor's burden of proof, as we do, in the United States, is impossible. It is really the judge's burden.[19]

On the substantive side, there are fewer points of law to argue and, consequently, the role of the defense counsel in France is diminished. A great deal of what goes on in a criminal trial in the United States is the result of the protections the Constitution guarantees the defendant. The civil law generally affords fewer protections. For example, while a defendant in a French trial can claim the benefit of a presumption of innocence, the prosecutor's burden is less weighty than his U.S. counterpart's and closely resembles the U.S. civil standard of preponderance of the evidence. Presumably, the detriment of this lower burden is offset by the more elaborate pretrial investigation that initially lead the independent investigating magistrate to conclude that the accused was guilty in the first place.

---

15. Michael E. Tigar, *A French White-Collar Trial: Quelle Différence!*, NAT'L L.J., Jan. 20, 1997, at A15.

16. Whitney, *supra* note 6.

17. Kamm & Barrett, *supra* note 14, at A12.

18. *See generally* Johannes F. Nijboer, *The American Adversarial System in Criminal Cases: Between Ideology and Reality*, 5 CARDOZO J. INT'L & COMP. L. 79, 79 (1997).

19. McKillop, *supra* note 7, at 578.

Judging, too, is different. If the investigating magistrate approves charges against the seven photographers, there will be no Lance Ito or Hiller Zoebel presiding over the courtroom. The case will be tried by a collegial body, a panel, most likely consisting of three professional judges and several lay persons. In a highly symbolic placement, they sit side-by-side on a elevated bench. Together, they play an activist role, supervising the proceedings and deliberating the defendant's guilt or innocence. The rules of evidence are virtually non-existent. The judges possess the power to admit all evidence they deem relevant. Since the lay and the professional judges deliberate together, there is no perceived need to protect the lay judges from prejudicial or attenuated testimony or physical proof.

The French criminal trial will seem off kilter to a U.S. trained legal observer for three other reasons as well. First, the panel is free to question the accused, both as to his *personnalité* and the facts of the crime. While the accused technically has the right to remain silent, he or she rarely does. The substantive law allows the panel to consider "what impression the means of defense have made upon their reason."[20] Since silence does not make a good impression in France, the accused very rarely declines to respond. The accused and close relatives will not testify under oath. Second, witnesses may request not to testify at all and ask the panel to rely instead on a written summary of their testimony that was prepared by the investigating magistrate and placed in the *dossier*. If the panel agrees, the witnesses will be subject to only limited questioning by the judges. If expert witnesses are called to testify, they will have been selected *by the judges* from a list maintained by the government and are viewed by all the parties in the process as neutral and nonpartisan. Generally, their actual testimony is quite brief and they will simply rely on their lengthy reports that are part of the *dossier*.[21] Third, no transcript is kept of the testimony. In the event of an appeal, the reviewing court will examine the written statements and reports of the witnesses developed by the investigating magistrate.[22]

In short, the trial is essentially a review of the dossier. It is a public airing of the findings and conclusions of the investigating magistrate. In purpose and style, it bears little resemblance to its U.S. counterpart. The tone and content of the instructions to the panel are so different that I would like to read them to you in full:

---

20. *Id.* at 576.

21. *E.g.*, Robert Goldspink, *The Expert Witness in International Litigation*, INT'L COM. LITIG., May 1998, at 29.

22. McKillop, *supra* note 7, at 566.

> The law does not require the judges to account for the means by which they are convinced, it does not prescribe rules on which depend the fullness and sufficiency of a proof; the law prescribes that the judges question themselves quietly and calmly, seeking to ascertain, with a sincere conscience, the rational effect of the proofs led against the accused and of his means of defence. The law asks of the judges one question only, which encompasses their whole duty: "*Do you have a personal conviction* [*of the guilt of the accused*]?"[23]

Finally, there is the role of civil parties in the criminal trial. In this country, a civil cause of action arising out of the same facts charged in a criminal indictment must be brought in a separate forum. The prosecutor is confined to proving the State's case for conviction and cannot ethically represent the victims of the crime in their separate action. In France, as in many other civil law countries, an individual who suffered injury as a result of the defendant's alleged criminal acts can register as a civil party to the criminal case. This enables the individual to have access to the magistrate's files and to the investigation itself as it develops and ultimately to win an award of damages if the defendant is found guilty. The estates of Princess Diana and Mr. Al-Fayed have both declared themselves to be civil parties to the investigating magistrates. The civil trial, if any, will take place immediately following a guilty verdict. It will be heard by the same panel of judges.[24]

In sum, there is very little doubt that the civil and common law systems have adopted very different approaches to the task of truth finding in criminal trials. Different is not necessarily better, however. Today's debate rests on the false premise that it is possible to demonstrate the superiority of one system over the other. I flatly reject that premise. Each system evolved over the course of time to meet distinct political, historical, and cultural needs. Except for scholarly attention, the two systems were relatively isolated until recently. However, as I indicated at the beginning of my remarks, that isolation is fast diminishing. In the criminal justice area, for example, teams of civil and common law lawyers are working together on the prosecution and defense of alleged

---

23. *Id.* at 583 note 74.

24. For example, one day after the Gironde Criminal Court convicted Maurice Papon of the criminal offense of having been an accomplice to the Nazi crimes against humanity, the court ordered him to pay approximately $750,000 in damages and legal fees to the victims and their lawyers. Craig R. Whitney, *Ex-Vichy Aide Is Ordered to $750,000 in Damages and Fees*, N.Y. TIMES, Apr. 4, 1999, at A4.

human rights violators.[25] Narcotics traffickers and white collar criminals show little respect for national borders, and consequently, local prosecutors in different countries are cooperating in ways that were unimaginable even ten years ago.[26] On the civil side, teams of lawyers from the common and civil law systems are now routinely working together on cross-border transactions and insolvencies.[27] More lawyers than ever before from civil law countries are coming to the United States to study in LL.M. programs and for internships in law firms and legal departments. U.S. law schools are adding comparative and international courses to their curricula at an unprecedented pace.[28] Finally, consider the impact of the contemporary entertainment culture on the lay public. How many of you know, for example, that L.A. Law was one of the most popular shows on TV in The Netherlands, Germany, and Austria? In The Netherlands, it stimulated much discussion in both the lay and legal press with respect to the role of lawyers.[29] John Grisham novels and the movies based on them are as popular in the civil law countries as they are in the United States.[30]

The synergy generated by these diverse forces, I predict, will facilitate change within both the common and civil law systems. The poet — and lawyer — John Donne wrote in the seventeenth century that "No man is an island." The same is true of legal systems in the fast approaching new millennium.

25. Karen L.K. Miller, *Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct*, CA32 ALI-ABA 199, 204 (1995) (describing a conversation among U.S. and foreign prosecutors concerning the ethics of witness preparation.)

26. *E.g.*, Eva M. Rodriguez, *FBI Takes Top-10 Fugitive Into Custody Thanks to Assistance From Vietnamese*, WALL ST. J., Jan. 7, 1998, at B15; Tim Taylor & Mark A. Cymrot, *U.S.-U.K. Treaty Provides Weapon Against Crime*, NAT'L L.J., June 5, 1995, at C9.

27. *E.g.*, *International Developments in* THE SEC SPEAKS 1998, 1037 PLI/Corp 149 (1998).

28. *E.g.*, *Symposium On Globalization*, J. LEGAL EDUC. 311 (1996).

29. Nijboer, *supra* note 18, at 79.

30. *E.g.*, Alan Cowell, *Cultural Intrusion Is a Blockbuster Best Seller*, N.Y. TIMES (Week in Review), May 11, 1997, at 2.